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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 376

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

vs.

STATE OF ALABAMA,
Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

St. LOUIS LAW PRINTING Co., Inc., 411-15 N. Eighth St., 63101. CEutral 1-4477.

DOCKETED AUGUST 5, 1968

PROBABLE JURISDICTION, NOTED OCTOBER 14, 1968

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 376

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**DOCKET ENTRIES IN THE CIRCUIT COURT FOR
THE FIFTEENTH JUDICIAL CIRCUIT OF
ALABAMA (MONTGOMERY COUNTY).**

Dunbar-Stanley Studios, Inc.,
vs. Appellant, } In Equity No. 36887.
State of Alabama, Appellee. }

June 8, 1966 Notice of Appeal from License Tax Assessment.
June 8, 1966 Security for Costs of Appeal.
July 14, 1966 Bill of Complaint.
July 18, 1966 Answer to Bill of Complaint.
Jan. 6, 1967 Order of Submission.
Jan. 6, 1967 Note of Submission.
March 14, 1967 Final Decree.
March 20, 1967 Notice of Appeal by Dunbar-Stanley Studios and Security for Costs.
March 21, 1967 Notice of Appeal issued to State of Alabama.
March 21, 1967 Certificate of Appeal.
May 1, 1967 Decree Extending Time for Filing Transcript in Supreme Court.
June 28, 1967 Decree of Supreme Court Extending Time for Filing Transcript.
July 7, 1967 Transmit Record to Supreme Court.

**DOCKET ENTRIES IN THE SUPREME COURT
OF ALABAMA.**

Certificate of Appeal—Filed March 22, 1967.

Record— Filed July 18, 1967.

April 10, 1967 Motion to Consolidate with 1st Div. 431.
April 17, 1967 Motion Denied.
August 18, 1967 Submitted on Briefs.
March 1, 1968 Transferred to Simmons
May 13, 1968 Affirmed.

From: The Circuit Court of Montgomery County,
In Equity.

Dunbar-Stanley Studios, Inc.,
Appellant,

vs.

State of Alabama,

Appellee.

Docket No. 86,887.

Solicitors for Appellant

Thornton and McGowin,
713 Merchants National Bank Building,
Mobile, Alabama.

Solicitors for Appellees

Hon. MacDonald Gallion, Attorney General,
Capitol,
Montgomery, Alabama.

Hon. William H. Burton, Assistant Attorney General,
Capitol,
Montgomery, Alabama.

BILL OF COMPLAINT.

Comes now Dunbar-Stanley Studios, Incorporated, a corporation, Appellant in the above styled cause, and shows unto this Court:

1. Appellant is a corporation organized and existing under the laws of the State of North Carolina. The Appellee is the sovereign State of Alabama.

2. On, to-wit, the 19th day of May, 1966, the State Department of Revenue made final assessments against Appellant for licenses imposed by Title 51, Section 569, Code of Alabama, as appears from the Transcript filed in this cause.

3. Prior to February, 1965, Appellant operated as a partnership, and the State Department of Revenue made final assessments against the partnership for licenses under section 569 of the Code for the period prior to the assessment against Appellant, as follows:

April 1, 1963 through September 30, 1965

| | |
|---------------------|----------|
| State | \$220.00 |
| Counties | 110.00 |
| Penalties | 49.72 |
| Interest | 48.35 |
| Citation Fees | 66.00 |
| Issuance Fees | 28.00 |

\$522.07

4. During all time here pertinent Appellant has been and is now engaged exclusively in interstate commerce for which it is not now liable to Appellee for the licenses claimed here or for any other license, in this:

(a) Appellant maintains no permanent or temporary office in the State of Alabama; Appellant owns no property in the State of Alabama, other than that which is brought in and out of the State by the photographers herein described; Appellant maintains no inventory or supplies in the State of Alabama other than those in the possession of the photographer; and Appellant maintains no permanent agent or employee in the State of Alabama.

(b) Appellant has no agents, servants or employees who take photographs in the State of Alabama who are residents of the State of Alabama.

(c) Appellant is engaged in the photography business with its principal office in Charlotte, North Carolina, specializing in children's photographs, under the trade name "Pixy Pin-Ups."

(d) J. C. Penney Company is engaged in business operating department stores in 47 states and in approximately 1500 communities, including in Alabama, the Cities of Decatur, Jasper, Mobile, Prichard, Andalusia, Birmingham, Anniston, and Dothan.

(e) Prior to the events set out in this appeal, J. C. Penney Company entered into an agreement with Appellant whereby Appellant did and still does the photography work of children in the stores of J. C. Penney Company. The method of operation provided by the agreement and the way Appellant acted in this case was:

(1) Photographers employed by Appellant, non-residents of Alabama, were at the disposal of the local Penney stores. The local store manager requested Appellant to send representatives for picture taking on specified dates. Depending on the size of the store and the population of the locality, these visits might vary from one to five times a year. Each visit lasted from two to five days. The visits to some of the cities were:

Decatur—August 30, 31, 1965, November 15, 16, 1965.

Mobile—January 12-16, 1965, March 16-20, 1965, June 8-12, 1965, August 17-21, 1965, October 12-16, 1965.

Andalusia—July 7-10, 1965, November 23-27, 1965.

Anniston—January 24-26, 1966.

A copy of a promotional sheet notifying the public of Appellant's activities entitled "Let's Get Acquainted" is attached hereto marked Exhibit A and by reference made a part hereof.

(2) Advertising for this visit was handled by the J. C. Penney Store, which store also took the orders for pictures, handled all money, and delivered the pictures to the customers when they were completed.

(3) Appellant's photographer took the pictures at the local J. C. Penney store, and returned the exposed film

to the home office of Appellant where they were developed, printed and finished. All orders are subject to final acceptance by the home office in Charlotte, North Carolina.

(4) After the pictures were finished, they were returned to the local J. C. Penney store, where they were paid for and picked up by the customers. The payments were made to the J. C. Penney Company store and not to Appellant or Appellant's photographers or agents.

(5) For its services in taking, developing, printing, finishing and producing pictures, Appellant was paid a percentage of the receipts from the J. C. Penney stores.

(6) The arrangements for the visits by Appellant's photographers and the advertising of the visits are handled and paid for by the local employees of the J. C. Penney stores. The solicitation of the sittings, and the location on the premises are made by local employees of the Penney store. The collection of the cost of the pictures and delivery thereof are all handled by the local employees of Penney.

(7) Appellant's activities are limited to taking pictures of persons obtained by Penney, at times and places arranged by Penney, and then transmitting the exposed film to Charlotte, North Carolina. Appellant has no further activity in Alabama with reference to these pictures. The only other activity of Appellant with reference to the picture is to develop, print, finish and mail the finished picture from Appellant's plant to the local Penney store.

(8) J. C. Penney Company has not now nor at any time involved in this suit, any photographic equipment or photographers in the State of Alabama. It does not offer any photographic service for compensation or otherwise in the State of Alabama except that of Appellant.

Prayer for Relief.

Wherefore, Premises Considered, Appellant prays that upon final hearing hereof that this Court hold:

1. That Appellant is not liable for the license imposed by said assessment,
2. That Appellant is engaged in interstate commerce,
3. That imposition of said license to the activities of Appellant violates the provision of the Federal Constitution including the commerce clause,
4. Such other, further and additional relief to which Appellant may be entitled in the premises.

Thornton & McGowin,
Solicitors for Appellant.

Filed July 14, 1966.

(Certificate omitted.)

(Exhibit omitted.)

ANSWER.

Comes the Appellee, State of Alabama in this cause, and acting by and through its lawful attorneys, answers the Bill of Complaint filed herein by the Appellant and each and every paragraph and part thereof, separately and severally, as follows:

1. Appellee admits the allegations of paragraph numbered "1" of the Bill of Complaint.
2. Appellee admits the allegations of paragraph numbered "2" of the Bill of Complaint, and Appellee has attached a copy of said final assessments to this Answer as Exhibit "I" thereto, and as a part thereof. And in further answer to paragraph numbered "2" Appellee admits that the Appellant has duly and timely appealed said final assessments to the Circuit Court of Montgomery

County, Alabama, in Equity, under the provisions of Title 51, Section 140, Code of Alabama 1940, and has paid the tax involved in lieu of making a supersedeas bond for the purpose of taking said appeal, and has also filed a cost bond therein.

3. Appellee admits the allegations of paragraph numbered "3" of the Bill of Complaint.

4. Appellee specifically denies the allegations contained in paragraph numbered "4" of the Bill of Complaint to the effect that the Appellant has been and is now engaged exclusively in interstate commerce for which it is not liable to Appellee for license taxes claimed under the assessment or for any other license, and further avers that said allegations of said paragraph are both untrue and incorrect.

(a) In answer to subparagraph (a) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief either to admit or deny the allegations of said subparagraph, and for that reason denies same and demands strict proof thereof.

(b) In answer to subparagraph (b) of paragraph "4", Appellee says that it is without sufficient information, knowledge or belief to either admit or deny the allegations of said subparagraph, and for said reasons it denies same, and demands strict proof thereof.

(c) In answer to subparagraph (c) of paragraph "4" Appellee admits the allegations of said subparagraph.

(d) In answer to subparagraph (d) of paragraph "4" of the Bill of Complaint, Appellee admits the allegations of said subparagraph, but also alleges that the J. C. Penney Company also has a store in Montgomery, Montgomery County, Alabama.

(e) In answer to subparagraph (e) of paragraph "4" of the Bill of Complaint, Appellee admits that the Ap-

pellant's photographers took the pictures and photographs in the J. C. Penney Company stores located in Mobile and elsewhere in Alabama, and that its photographic work in this respect is limited to the taking of pictures and photographs of children. However, Appellee is without sufficient knowledge, information or belief concerning the alleged fact that the Appellant had entered into an agreement with the J. C. Penney Company concerning the taking of such photographs, and for that reason denies this specific allegation, and demands strict proof thereof.

(1) In answer to subparagraph (e), (1) of paragraph "4" of the Bill of Complaint, Appellee admits that the photographers used to take the pictures or photographs are employees of the Appellant, but Appellee denies that said photographers are nonresidents of Alabama, and were at the disposal of the local Penney's stores. Appellee also admits that specific dates were set for the taking of the pictures or photographs by Appellant's photographers in said local J. C. Penney stores. However, Appellee denies that the photographers were sent to the local J. C. Penney stores at the request of the store managers or representatives of J. C. Penney. Appellee also admits that specific dates were set for the taking of the pictures or photographs by Appellant's photographers in said local J. C. Penney stores. However, Appellee denies that the photographers were sent to the local J. C. Penney. Appellee admits that specific dates were set for the taking of the pictures or photographs by the Appellant's photographers in said local J. C. Penney stores, depending on the size of the store and the population of the locality, and that such visits by the photographers varied from one to five times a year, and that each visit lasted from two to five days. Appellee also admits the remainder of the allegations made by the Appellant in said subparagraph (3), (1) of paragraph "4", but says that such averments are incomplete in that it is not shown on what dates the pho-

tographers took the pictures at the J. C. Penney store located in Montgomery, Montgomery County, Alabama.

(2) In answer to subparagraph (e), (2) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said subparagraph, and for that reason same are denied, and strict proof is required thereof.

(3) In answer to the allegations made by the Appellant in subparagraph (e), (3) of paragraph "4" of the Bill of Complaint, Appellee admits the allegations of said subparagraph.

(4) In answer to subparagraph (e), (4) of paragraph "4", the Appellee says, that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said subparagraph, and for that reason demands strict proof thereof.

(5) In answer to subparagraph (e), (5) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said subparagraph, and for that reason demands strict proof thereof.

(6) In answer to subparagraph (e), (6) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said paragraph, and for said reasons the Appellee demands strict proof thereof.

(7) In answer to subparagraph (e), (7) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said paragraph, and for said reasons the Appellee demands strict proof thereof.

(8) In answer to subparagraph (e), (8) of paragraph "4" of the Bill of Complaint, Appellee denies the allegations of said subparagraph.

And in further answer to the Bill of Complaint, Appellee denies that the license tax involved is under the circumstances as alleged in the Bill of Complaint directed in any respect at interstate commerce or that it places a burden on interstate commerce, in that our State Supreme Court has held on, not one, but two separate occasions that this particular license tax as levied under Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, on transient or traveling photographers, is directed at the photographer and at the activity of the photographer in taking the picture or photograph in Alabama, which is a local event taking place entirely in Alabama, and which can be realistically separated from the company's other activities which might take place in interstate commerce, and that the license as so levied and applied on such traveling photographers who come from without the State is valid and lawful and does not offend the Commerce Clause of the Federal Constitution.

And in further answer to the Bill of Complaint, Appellee says that the contentions made by the Appellant herein, and issues involved in this cause, have already been decided and resolved against the Appellant, in not one, but two separate cases which represent the latest and last pronouncement on the same subject matter by our State Supreme Court, namely, *Graves v. State*, 258 Ala. 359, 62 So. 2d 446, and *Haden, Commissioner of Revenue v. Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388, and that this case already stands decided against the Appellant and to the effect that it is duly and lawfully required to pay the transient photographer's license tax under the circumstances; thus, the doctrine of stare decisis is clearly applicable.

Wherefore, Premises Considered, your Appellee prays that this Honorable Court will upon final submission of this cause enter a judgment and final decree in favor of the Appellee and against the Appellant affirming in all respects said final assessments of license tax, and will tax the costs of said cause against the Appellant.

/s/ Richmond M. Flowers,
Richmond M. Flowers,
Attorney General,
State of Alabama,

/s/ Willard W. Livingston,
Willard W. Livingston,
Counsel, Department of Revenue and
Assistant Attorney General,
State of Alabama,

/s/ Wm. H. Burton,
William H. Burton,
Assistant Counsel, Department of
Revenue, and Assistant Attorney
General,
State of Alabama,
Solicitors for the Appellee.

Filed July 19, 1966.

(Certificate omitted.)

(Exhibits omitted.)

[1*] **TRANSCRIPT OF PROCEEDINGS.**

In the Circuit Court of Montgomery County, Alabama.

In Equity.

Dunbar-Stanley Studios, Incorporated, a Corporation,

Appellant,

vs.

State of Alabama,

Appellee.

**Case No.
36887.**

Before: Hon. Richard P. Emmet, Circuit Judge, 15th Judicial Circuit of Alabama, at the Court House, Montgomery, Alabama, Friday, January 6th, 1967.

Appearances:

For the Appellant: Messrs. Thornton and McGowin, Attorneys at Law, Mobile, Alabama. By: J. Edward Thornton, Esq.

For the Appellee: Hon. Richmond M. Flowers, Attorney General, State of Alabama. Hon. Willard W. Livingston, Counsel, Department of Revenue and Asst. Attorney General, State of Alabama. By: Hon. William H. Burton, Asst. Counsel, Department of Revenue, and Asst. Attorney General, State of Alabama.

[2] Mr. Burton: If the Court please, actually, we have two cases here. The case that is going to be tried is Case No. 36887. It is styled Dunbar-Stanley Studios, Incorporated vs. The State of Alabama. Now, the other case is No. 36886 and we have an agreement, as I understand it, and if I am wrong, I want Mr. Thornton to correct me on this, that this case No. 36887 will be tried.

*** Numbers appearing in text in brackets indicate page numbers of original stenographic transcript of testimony found in upper left hand margin in transcript of record.**

Mr. Thornton: That's correct.

Mr. Burton: But that the decision in this case will also be governing as to the disposal of Case No. 36886.

Mr. Thornton: That is correct.

Mr. Burton: We are just going to try this one case, and let it also govern the other case. Now, that is No. 36887 that will be tried. Now, Case No. 36887 involves the license year of 1963. There are two assessments—

Mr. Thornton: That's right. One is against the partnership and one is against the corporation.

Mr. Burton: Yes, and the first year there is 1963 through 1964, license tax year. The next one is the 1964 and 1965 tax period. There are two separate tax years involved and this case having the first number I presume that it is the 1963-1964 year, even although the complaint combines both years and both assessments. Now, the 1963-1964 assessment is in the total amount of \$225.84 and it covers the period from October 1st, 1963 through September 30th, 1964. It is for the photographer's license under Sec. 569 under Title 51 and in it this particular case is confined to what we call the transient photographer's license and you will find that in the very last sentence of Sec. 569. That statute covers a photograph gallery but we are not concerned here with a photograph gallery, although that is the name of the statute it is all inclusive and says photographers and photograph galleries but we are concerned here only with the last sentence there and that is the transient dealers license or transient photographers license as it is stated in that last sentence and it is a \$5.00 a week license. Now, the assessment year of this year covers nineteen various counties in which these photographers belonging to this company or associated with this company have allegedly taken pictures in certain J. C. Penney Stores. In other words, this is kind of an arrangement between Dunbar-Stanley [3] and the J. C. Penney Stores and this will be enumerated on in the evidence. We have made these assessments for the activities

of these photographers in taking pictures in these nineteen various counties and the J. C. Penney Stores located in those counties, and we have assessed them so much per week as manifested by the assessment for their activities under this license law in those counties. Briefly, that is what this case is about without getting into the law at this time.

The Court: I see. You are levying the tax under Sec. 569, and it is the contention of the taxpayer that it being in interstate commerce that the State of Alabama has no jurisdiction.

Mr. Thornton: That's correct.

The Court: Now, do we need to take a little testimony?

Mr. Thornton: Yes, sir.

Mr. Burton: Now, let me ask one question, Your Honor. Do you want any more on the assessment? Do you want me to put the assessment in evidence?

Mr. Thornton: Not necessarily.

Mr. Burton: Well, all right, but you admit that the assessment was made, do you not?

Mr. Thornton: Oh, yes.

Mr. Burton: You are denying the correctness, of course, and the validity but you do admit that the assessment has been made as I have stated by the State Department of Revenue.

Mr. Thornton: Yes.

Mr. Burton: But you are just denying the validity thereof.

Mr. Thornton: Yes.

Mr. Burton: All right, then. We will just stand on that statement that the assessment has been made in the amount of \$225.84 through the 1963-1964 tax year covering these alleged nineteen different counties where their photographers are said to have taken pictures in the J. C. Penney Stores.

The Court: All right. You may proceed with the first witness, Mr. Thornton.

[4] **STANLEY LIVINGSTON HOKE**,
having been duly sworn, was called as a witness for the
Appellant, and testified as follows:

Direct Examination, by Mr. J. Edward Thornton.

Q. What is your name, sir? A. Stanley Hoke.

Q. Where do you live, Mr. Hoke? A. I live in Charlotte, North Carolina.

Q. Now, Mr. Hoke, an assessment out of which this case arose was against S. L. Hoke and N. C. Holden, a partnership, doing business as the Dunbar-Stanley Studios. Are you familiar with that organization? A. Yes, sir.

Q. What is it? What was it? A. Yes, was is the correct term. It is no longer a partnership. It was a photographic organization making pictures in forty-eight states.

Q. Who was S. L. Hoke in that partnership? A. That was me.

Q. You were one of the partners in that partnership? A. That is correct.

Q. Now, the Dunbar-Stanley Studios, Incorporated, a corporation, what is that? A. That is a wholly owned corporation owned by myself. Mr. Holden is not a member of that. The corporation has bought out his partnership and formed a corporation effective a little better than a year ago.

Q. Now, what business is it engaged in? A. It is engaged in the business of making photographs both in the United States and in Europe.

Q. What is your connection with it? A. President.

Q. All right. Now, Mr. Hoke, if you will refer to the Bill of Complaint in this case possibly we can expedite the facts in the case. A. If I can see through these dime store glasses, I will.

Mr. Burton: Well, that's all right. Your Honor, I don't
[5] many of the facts are actually in dispute. There might be one phase there in dispute but I have no objections if it will expedite it to his going right on down the line and

reading them except that there is one possible phase of dispute which we have discussed.

The Court: All right. You may proceed.

By Mr. J. Edward Thornton: (Continuing).

Q. All right. Mr. Hoke, the first paragraph there, the paragraph with reference to the incorporation and the capacity of the State of Alabama—that has been admitted and so no testimony will be necessary on that. Now, Section 2 relates to the fact that an assessment was made against the Appellant here and that has also been admitted, and, so, I take it, we do not need testimony on that. The third section does the same thing in setting out the amount of the assessment and that has been admitted and so we do not need any testimony on that. Now, Section 4 recites how the business was done by the Appellant and by the Appellant we mean Dunbar-Stanley Studios, Incorporated, a corporation. Now, Subsection (a) under Paragraph No. 4 says as follows: "Appellant maintains no permanent or temporary office in the State of Alabama; Appellant owns no property in the State of Alabama, other than that which is brought in and out of the State by the photographers herein described; Appellant maintains no inventory or supplies in the State of Alabama other than those in the possession of the photographer; and Appellant maintains no permanent agent or employee in the State of Alabama." Now, Mr. Hoke, is that true or false? A. That is true.

Q. Now, Subsection (b) says, "Appellant has no agents, servants or employees who take photographs in the State of Alabama who are residents of the State of Alabama." Is that true or false, sir? A. That is true.

Q. Now, Subsection (c) says, "Appellant is engaged in the photography business with its principal office in Charlotte, North Carolina, specializing in children's photographs, under the trade name 'Pixy Pin-Ups.'"

Mr. Thornton: Well, I believe that has been admitted, has it not?

Mr. Burton: Yes, that is admitted.

[6] By Mr. J. Edward Thornton (Continuing).

Q. The next section is Subsection (d) "J. C. Penney Company is engaged in business operating department stores in forty-seven states and in approximately fifteen hundred communities, including in Alabama, the Cities of Decatur, Jasper, Mobile, Prichard, Andalusia, Birmingham, Anniston, and Dothan." Now, sir, is that true? A. Yes, that's true with a limited—they operate in more cities than this.

Q. But they do operate in those cities, do they not? A. Yes, that is correct.

Q. That is the J. C. Penney Stores do? A. Yes.

Q. Now, Subsection (e) says, "Prior to the events set out in this appeal, J. C. Penney Company entered into an agreement with Appellant whereby Appellant did and still does the photography work of children in the stores of J. C. Penney Company. The method of operation provided by the agreement and the way Appellant acted in this case was: (1) Photographers employed by Appellant, non-residents of Alabama, were at the disposal of the local Penney stores. The local manager requested Appellant to send representatives for picture taking on specified dates. Depending on the size of the store and the population of the locality, these visits might vary from one to five times a year. Each visit lasted from two to five days. The visits to some of the cities were: Decatur, August 30th, 31st, 1965, November 15th, 16th, 1965. Mobile, January 12th-16th, 1965, March 16th-20th, 1965, June 8th-12th, 1965, August 17th-21st, 1965, October 12th-16th, 1965. Andalusia, July 7th-10th, 1965, November 23rd-27th, 1965. Anniston, January 24th-26th, 1966. A copy of a promotional sheet notifying the public of Appellant's activities entitled 'Let's Get Acquainted' is attached hereto marked Exhibit A and by reference made a part hereof." Now, Mr. Hoke, is that a true statement of fact? A. Substantially. I can't verify these dates. I think that this sheet that we are talking about—

Mr. Burton: We will admit the dates of it. We don't dispute those dates and we will admit them.

The Witness: Where it says there, "A copy of a promotional sheet notifying the public of Appellant's activities entitled 'Let's Get [7] Acquainted', I just want to point out that this is not a promotional sheet. The way we actually notify the public that we are going to be there is by a newspaper ad. This sheet goes to the people when they come back to the store and they receive their photographs. They just get this to take home notifying them about our organization. However, that's after the fact, shall we say. This is not so much a promotional sheet and this sheet actually no longer exists.

By Mr. J. Edward Thornton (Continuing).

Q. Well, was it until about the time we—— A. Yes, we did. It went in our envelopes at the time but our promotion was done by the newspaper.

Q. All right. Now, the next section of this Bill of Complaint, Mr. Hoke, says—it is No. 2 on page 3, and it says, "Advertising for this visit was handled by the J. C. Penney Store, which store also took the orders for pictures, handled all money, and delivered the pictures to the customers when they are completed." Now, sir, is that true or false? A. That is correct.

Q. All right. Now, the next section, No. (3) has been admitted and it says, "Appellant's photographer took the pictures at the local J. C. Penney store, and returned the exposed film to the home office of Appellant where they were developed, printed and finished. All orders are subject to final acceptance by the home office in Charlotte, North Carolina." Now, that section has been admitted and we will need no testimony as to that. Now, let's see about the next one. The next one is No. (4). It says, "After the pictures were finished, they were returned to the local J. C. Penney store, where they were paid for and

picked up by the customers. The payments were made to the J. C. Penney Company store and not to Appellant or Appellant's photographers or agents." Now, is that true or correct? A. That is correct. We had no agents to go to the store. Only photographers.

Q. All right. Now, on the next page, Page 4, Subsection (5) says, "For its services in taking, developing, printing, finishing and producing pictures, Appellant was paid a percentage of the receipts from the J. C. Penney stores." Now, Mr. Hoke, will you explain the way that was handled with reference to [8] that percentage? Who gets the percentage is what I am asking you. A. Well, going back to 1953 when we entered into our agreement with the Penney Company, we agreed to take photographs throughout all of their stores throughout the United States. We send only a photographer into the town and the photographer makes the photographs and sends the films back to Charlotte, North Carolina, as we stated and they later then come to the store as completely finished photographs. It is not a proof or something that the customer orders from. In other words, when the pictures come immediately back from our finishing plant, that is a finished product. When the customer comes into the store they pick up from the store their finished pictures and whatever they want they pay for at that particular time after the initial payment which entitles them to one picture. When this thing is finalized at the end of the week or ten days or whatever time it takes the customers to come by and pick up their pictures at the store, we are sent a sum of money representing the amount of money that the customers paid less the advertising cost that the store paid and less the commissions that we have agreed on in our relationship with Penney Company. Maybe we say we get a commission or Penney Company says that they get a commission and it just depends on which side of the fence we are on.

Q. All right. What is the commission that the Penney Company is paid, sir? What is the amount of the commission? A. It is twelve and one half per cent.

Q. Is that based on a gross figure or a net figure? A. That is based on a net figure.

Q. Well, isn't it gross? A. Well, after advertising comes out.

Q. Well, I thought it came out before the advertising? A. No, I don't think so. Maybe it could and maybe I'm wrong.

Q. Well, it is your business, sir, and I am not trying to tell you—— A. Well, it could be on the gross figure but I thought—that's right. You are correct. They pay us twelve and a half per cent on the gross.

Mr. Burton: May we go off the record for a minute, Your Honor?

The Court: Yes, sir.

(Off the record discussion between Court and counsel.)

[9] **Direct Examination:** (Continued), by Mr. J. Edward Thornton.

Q. Now, Mr. Hoke, I show you three documents here and I will ask you to tell us what those are. Who printed those forms I have reference to? A. These forms were forms that were made by the Penney Company in their accounting department in New York and we printed these.

Q. You printed the forms and furnished them to the Penney Company. Isn't that correct? A. Yes, according to their specifications and we send these to the stores and this is called a Cashier's Report for the Penney Company to account not only to us about the photographic transactions but also to their New York office. All of our accounting goes into the New York office through duplicate accounting.

Q. All right. Now, those are each a duplicate. What store did they relate to exactly? A. This store here was in Mobile, Alabama.

Q. And they related to a visit by your representative to the store in Mobile, Alabama, is that correct? A. That's correct.

Q. Now, to direct your attention specifically to one little item in the upper right hand corner and to answer specifically the question as to whether the twelve and one half per cent is gross or net—that shows you the gross receipts and then shows you less twelve and one half per cent of column No. 1 and I believe that Column No. 1 is gross receipts, is it not? A. Yes, sir. That is correct.

Q. Now, the twelve and one half per cent goes to the Penney Company. A. That is correct.

Q. Then, the Penney Company pays off all of the expenses and then the balance is remitted to— A. Less advertising costs here. That's correct.

Q. And this printed form here shows the exact way that the Penney Company and Dunbar-Stanley are and have been operating for some while during all of the time that is involved in this case? A. That's correct.

Mr. Thornton: We would like to offer these three documents [10] into evidence to illustrate the way the accounting is done between the parties.

Mr. Burton: We have no objection.

The Court: All right. Received without objections.

(Whereupon, One Pixy Pin-Ups Cashier's Report, marked Appellant's Exhibit No. 1 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Pixy Pin-Ups Cashier's Report for the Period of November, marked Appellant's Exhibit No. 2 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Pixy Pin-Ups Cashier's Report, marked Appellant's Exhibit No. 3 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Direct Examination: (Continued), by Mr. J. Edward Thornton.

Q. Mr. Hoke, the next paragraph in the Bill of Complaint which is on Page No. 4 of the Bill of Complaint, Paragraph No. (6) says, "The arrangements for the visits by Appellant's photographers and the advertising of the visits are all handled and paid for by the local employees of the J. C. Penney Stores. The solicitation of the sittings, and the location on the premises are all made by local employees of the Penney store. The collection of the cost of the pictures and delivery thereof are all handled by the local employees of Penney." Now, sir, is that true or false? A. That is substantially true.

Q. Now, Mr. Hoke, I show you these three cards and would you tell us what they are? A. These are Reservation Request Cards. We send these cards with a letter to the store and tell them to use these cards to request our services at a particular date and, as you can see, to give us alternative dates. We [11] have three choices. It merely means that the store could give us the three dates that they pick out. This is done usually very heavily at the first of the year and we try to set this up according to the store's desires. They usually want this thing when they are not so busy and not always can we fill these dates but we try hard to do it.

Q. And these three that I have handed you are actually reservation requests that were mailed and sent to Dunbar-Stanley? A. That is correct. There is one from Andalusia, one from Opelika and one from Decatur.

Q. Now, I show you a photostatic copy of three others. Are they the same thing? A. That is correct. In fact, they all have their alternative dates here.

Mr. Thornton: We offer these in evidence, if the Court please.

The Court: All right. Let them be marked by the Reporter. Any objections?

Mr. Burton: No objections.

The Court: All right. Received without objections.

(Whereupon, a Photostatic Reproduction of Three Reservation Requests dated November 24th, 1965, November 24th, 1965 and December 13th, 1965, marked Appellant's Exhibit No. 4 for identification, were received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Reservation Request, dated November 10th, 1966, marked Appellant's Exhibit No. 5 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Reservation Request, dated November 17th, 1966 marked Appellant's Exhibit No. 6 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

[12] (Whereupon, One Reservation Request, dated November 7th, 1966, marked Appellant's Exhibit No. 7 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Direct Examination (Continued),
by Mr. J. Edward Thornton.

Q. Mr. Hoke, I show you here a handful of additional Reservation Requests. Are these all the same sort of thing that we have just introduced into evidence? A. That is correct. They are about the same.

Q. Now, Mr. Hoke, the next paragraph in the Bill of Complaint on Page No. 4 is Paragraph (7) and it says, "Appellant's activities are limited to taking pictures of

persons obtained by Penney, at times and places arranged by Penney, and then transmitting the exposed film to Charlotte, North Carolina. Appellant has no further activity in Alabama with reference to these pictures. The only other activity of Appellant with reference to the picture is to develop, print, finish and mail the finished picture from Appellant's plant to the local Penney store." Is that true or correct, sir? A. That is true. That's exactly true.

Q. Now, the next paragraph is Paragraph No. (8) and it says, "J. C. Penney Company has not now nor at any time involved in this suit, any photographic equipment or photographers in the State of Alabama. It does not offer any photographic service for compensation or otherwise in the State of Alabama except that of Appellant." Is that true or false? A. That is true.

Q. All right. No further questions.

Cross-Examination, by Mr. William H. Burton.

Q. Mr. Hoke, in regard to these counties in which your photographers have operated here in the J. C. Penney Stores that have taken these Pixy pictures I believe that we found from your records that there are some nineteen counties that were involved during this 1963-1964 tax or license year. Is that correct? There are some nineteen locations or Penney Stores involved where your photographers did take these pictures? [13] A. I could not say categorically that that is correct. I would assume it is. I have no actual count with me. I imagine there are that many locations in the State of Alabama in which we do photographic work. It seems to be a little high to me. I didn't know we have done that well.

Q. But our agents who made the audit did find, that's what they tell me, from your records that there were nineteen such locations in Alabama. A. I believe that would be very close to correct.

Q. In nineteen different counties. Now, I believe Mr. Thornton in his Complaint—he names Decatur, Mobile, Andalusia and Anniston as some of these locations and I believe he named Jasper, Mobile, Prichard and Andalusia, Birmingham, Anniston and Dothan. I might have repeated some of them. I believe that Montgomery is also involved. Is that correct. A. It could be. It seems to me that we had this local store that hasn't used our services for some time but I am pretty sure that back at that time they did.

Q. In other words, the ones named in the Complaint, while it is correct that these services were performed in those stores at those localities, there were some others that were not named. A. I would believe that would be probably correct. I don't know. I cannot affirm or deny that. Actually, I don't know how many Penney Stores there are in the State of Alabama. I have a list, however, and if I can find it, I can tell you real quick.

Q. But this service was rendered. This Pixy photographic service was rendered by your photographers in all of the J. C. Penney Stores in Alabama. Is that correct? A. No. Not all of the stores in the State of Alabama. For instance, Florence, Alabama has a Penney Store but they do not use our services.

Q. But it was in most of them, was it not? A. Yes, sir. I would say in the majority of them.

Q. Now, these photographers, there is no question but that they were your employees that were sent to these various stores in Alabama, the various Penney Stores. They were your photographers, were they not? A. Definitely. Yes, sir.

Q. Of course, when I say you, I mean Dunbar-Stanley photographers. A. Correct.

[14] Q. Now, when they went to these localities and in performing this service they did take pictures, did they not? I believe you call them the Pixy Pin-Up Pictures? A. That's correct.

Q. And with their cameras they did take the negative, I guess you would call it, and— A. They exposed the negative. Yes, sir.

Q. After they took the exposure there at the local Penney Store, did they send the negative into your—I believe your office is located in Charlotte, North Carolina. Is that correct? A. That is correct.

Q. Did the Photographers send the negatives in after taking the pictures to your office? A. Yes. They mailed the exposed undeveloped film to Charlotte, North Carolina for development.

Q. Then, I believe, you made the prints there, developed the negatives and made the prints there in Charlotte, North Carolina. A. That is correct.

Q. At your plant. A. Correct.

Q. Now, when those prints were made were they sent back to the various Penney Stores? Just what happened after the prints were made? A. After the prints were processed and after the organization decided that they were good enough to fill the bill in the town—this is an individual case in each customer's point—if they are not satisfactory then the money is refunded by the store, but substantially we send all the pictures back to the J. C. Penney Company in one big package or in two or three packages depending upon the amount of time we stay and then those are shown to the customers by a regular J. C. Penney employee who is employed in the store. For instance, they usually use the girl in the Lay-Away Department or something of that sort and these are put out in front of the customers and they take what they want. Now, if the pictures are bad and we shoot—sometimes this occurs—and there is a streak or a scratch—and we have to discard the pictures and we can't satisfy the customer then we contact the store with this customer's name and a refund is made and [15] then the next time the customer comes into the store they get a free photograph

In spite of the fact that a refund has been made because of the trouble they went to without getting a picture.

Q. Well, most of them I have seen, and I am going to be frank with you, have been very fine pictures. A. Thank you.

Q. However, that's not the question. You do good work. There is no doubt about that. A. Well, sir, that's worth coming here for.

Q. Well, the primary function of your company then in Alabama insofar as the local situation is concerned is actually the taking of the pictures at these various places in Alabama, the Penney Stores, by your photographers. Is that correct? A. That is correct. At the request of the Penney Company.

Q. Now, in regard to the collections. I believe that is done by the Penney employees at the local stores. They collect for the pictures if the people accept them? A. That is exactly right.

Q. Actually, don't you pay the Penney Company twelve and one half per cent commission for its services at each of these stores from the gross proceeds, that is, from all of the pictures so sold there? A. Would you restate that?

Q. Well, I am asking you if you do—in other words, as I understand it, the J. Q. Penney Company collects all of the funds. A. That's correct.

Q. For all of the pictures there that are sold under this arrangement and Penney has the funds and out of those funds I believe that the advertising is paid for. Is that correct? A. That's correct. It is paid out of the funds.

Mr. Thornton: Well, now, Mr. Burton, I don't want to interrupt you but those exhibits we have there will show that precisely.

By Mr. William H. Burton (Continuing).

Q. But the Penney Company does get twelve and one half per cent gross out of these funds for the services that it renders, does it not? [16] A. Twelve and one half per cent commission of the gross. Shall we say as payment for their services or their normal—whatever they want to call it—profit. They don't—well, I wouldn't elaborate on it.

Q. Well, let me ask you this now. Your organization, that is, Dunbar-Stanley and J. C. Penney in regard to this arrangement, they are two independent corporations or companies, are they not? A. Yes, that is correct.

Q. There is actually no agency existing between the two. They act as two independent contractors you might say. Is that correct? A. That is correct, and no actual contract exists between myself and the Penney Company. It has been a verbal thing since 1953 as long as we perform our duties with no violation of the correct code of ethics, as the Penney Company sees it, we retain our relationship. Of course, it would be natural, if we didn't, that we wouldn't. So, there is not even an existing contract. It is just a tacit agreement.

Q. All right. Now, as to the customers, that is, the people that come in and ultimately buy the pictures after they are taken under this arrangement, I will ask you if Dunbar-Stanley doesn't actually get those lists of customers up? I mean, they actually initiate getting those lists of customers up in each instance. In other words, when your photographer is going to come to one of the Penney localities then he is going to come there and take these pictures. That is correct, is it not? A. That's correct.

Q. In other words, these people are customers whose pictures are going to be taken. They have to be notified or informed that the photographer is going to be at a certain Penney Store on a certain date. Isn't that correct? A. That's correct.

Q. And that the pictures will be taken on that date?
A. Correct.

Q. Or the sittings or whatever you may call it? A. Yes.

Q. Now, isn't it a fact that Dunbar-Stanley actually sends these local Penney Stores the cards more or less setting up these appointments and the card there is to be mailed by Penney to the company. In other words, the card is originated by Dunbar-Stanley and sent to Penney's and then Penney's [17] mails the card out to the customer. Is that the correct procedure? A. Substantially. These cards—the Penney Company furnishes us a list of the names of the people that we take photographs of when we are in town. Now, to this list of people—to the previous customers—we address a card and send it back to the Penney Company and they send it to the customers stating that the same photographers are going to be back and this only goes to our previous customers. It is a customer notification card that we are going to be back to perform the same services that we did before. We don't get up a list. It is from the list that the Penney Company sends us on the previous promotions.

Q. Well, don't you have a list there though probably from previous promotions? A. Oh, yes.

Q. And you prepare these cards yourself there in Charlotte, North Carolina? A. Yes, that's correct.

Q. You send them to Penney and Penney actually does the mailing. A. That is correct and they pay the postage.

Q. Well, now, that postage though is deducted out of the amount paid in by the customer, is it not? A. No, sir. That's not right. The postage is completely the Penney Company's. By our agreement on these things, the postage money is an expense of the J. C. Penney Company. The ad itself is our expense.

Q. In other words, you pay for the ad—— A. That's right. That's the reason we send the cards to the town to be mailed from the town. Otherwise, if we paid the

postage, we would pay it from Charlotte and if you will notice by looking at those cards the postmarks are from Mobile, for instance. Those were mailed in Mobile.

Q. Well, I don't think that there is any doubt but that Penney mails the cards out. A. Yes, sir. That's right.

Q. But you prepare the cards, don't you? A. We prepare the cards. Yes, sir.

Q. From your list of customers that you have in Charlotte. A. Exactly.

[18] Mr. Burton: If the Court please, I would like to offer this card into evidence as State Exhibit No. 1.

The Court: All right. Let it be marked.

(Whereupon, One Pixy Pin-Up Advertising Card, dated January 10-14, marked State Exhibit No. 1 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Cross-Examination (Continued),

By Mr. William H. Burton.

Q. Now, here is a copy of a Pixy Pin-Up Ad that appear in the Mobile paper. This is from the Mobile Springdale Store. Is that typical of your ads? A. That is the only ad we use as a rule. This ad has been used for a number of years and it is the primary ad.

Q. Well, now, that is paid for by Dunbar-Stanley. I mean, that ad is deducted from the funds which are derived from the pictures? A. That is correct.

Mr. Burton: I offer this in evidence as State Exhibit No. 2, Your Honor.

Mr. Thornton: No objections.

The Court: Received.

(Whereupon, One Penney's Pixy Pin-Up Newspaper Ad, Mobile, Alabama, marked State Exhibit No. 2 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Cross-Examination (Continued),

By Mr. William H. Burton.

Q. Now, all these forms, Mr. Hoke, they are prepared—even these forms here—as I understand it, the settlement forms and the cards and all of that are actually prepared by Dunbar-Stanley but are sent to Penney's [19] and Penney might fill the forms out but originally these forms are prepared by Dunbar-Stanley. Is that correct?

A. That is correct.

Q. And this same procedure has been followed at all of these nineteen Penney Stores to which you send your photographers. Is that correct? A. The same procedure, yes. Identical.

Q. All right, sir. That's all.

Redirect Examination, by Mr. J. Edward Thornton.

Q. Mr. Hoke, with reference to the arrangement between Dunbar-Stanley and J. C. Penney, you repeated on one or two occasions—you said there was no contract but that there was only an agreement. Now, sir, let's clarify that a little bit. There was a contract between you but it wasn't in writing. Is that what you were really attempting to say? A. The only thing that we could term a contract occurred in 1953 in which the Penney Company by letter said that you are now permitted to work all of our stores and we want you to take our stores over and the following rules and regulations we hope you will observe. We wrote them a letter confirming this and it never was in a legally notarized contract. It was just an agreement.

Q. Well, there is this existing agreement and the parties have abided by it according to the terms of it throughout the years. A. That is right. That includes the percentage agreement and who mails the cards and who pays for the cards and the newspaper advertising and so forth, and, naturally, that exists in the form of an agreement but

an actual, signed, notarized contract that we can work the Penney Company Stores to the exclusion of anyone else, that sort of thing doesn't exist, really.

Q. Now, Mr. Hoke, this business that you are in is highly competitive and there are quite a few others that are in and have been in this type photographic business, aren't there? A. Many of us, yes.

Q. Now, some of these people who do photographic work, they come into the State and they take pictures and then leave and leave no representatives there. Have there been complaints of that kind of activity where the photographers [20] do not have a local office where the customer can, in effect, see to it that their agreements are lived up to? A. I don't believe I follow you, exactly.

Q. Well, let me state it this way. There have been complaints by Better Business Bureaus and by other groups with reference to non-resident, transient photographers. Isn't that right? A. Oh, yes. Many.

Q. And the basis of that objection has been that they do not have a local representative where the customer can go to see about his pictures. Is that the basis of that?

Mr. Burton: Your Honor, I am going to object to that as hearsay and it is immaterial and irrelevant.

The Court: Well, let me note your objection and say that the Court is not going to consider anything but legal, relevant and material testimony.

The Witness: Yes. There are many complaints existing in this field and frankly I feel it is one of the reasons we are pre-eminent in this field because there are never any complaints about us. We do the business through the Penney Company's headquarters and, of course, the customer is well protected. Now, the transient photographer is one who operates out of a hotel and doesn't send the finished picture back and he sends a proof or something and then when the mother gets the proof—

Mr. Burton: I am going to object to his defining a transient photographer.

Mr. Thornton: Well, I believe you were interrupted. Finish your sentence and then we will note Mr. Burton's objection.

The Witness: Well, I was stating that the photographer who occasions all of the trouble is the transient photographer who comes to town and does not deliver the goods or who causes excessive selling and who sends his own sales agents in as opposed to us. We don't send agents in to sell anything. The Penney Company merely handles the delivery of our photographs.

Q. All right, sir. I have no further questions.

Recross-Examination, by Mr. William H. Burton.

Q. In other words, you are primarily involved locally in that your [21] photographers have taken the pictures?

A. That is correct.

Q. All right. I have no further questions. A. I might add this though. The price on our photographs, of course, seems to be ridiculously low. It is and there is no doubt about that. I am not giving a sales talk here but the reason that it can be so low is primarily due to the fact that we do not have to send another crew into town to put up in a motel or places like that and pay room rent and squeeze the people and then send the pictures back for further finishing to be mailed back. All of this complicated process only runs the price of the pictures up. Our fundamental operation with the Penney Company is as a service operation making the photographs that are developed in the State of North Carolina and shipped back through the mail to be delivered by the Penney Company representative and not ours.

Q. Well, that is mainly a matter of economy, there and good business, you might say. A. That is right.

Q. All right, sir. That's all.

Mr. Thornton: We rest, if the Court please.

Mr. Burton: Your Honor, we have a plea to the effect that this question has already been adjudicated by our Supreme Court—

Mr. Thornton: Well, do you have any further testimony?

Mr. Burton: No. We have no testimony but we say that this has already been decided and we have a plea in answer to the Bill of Complaint and in support of that I would like to put in evidence a decision of our Supreme Court. The first one is Leon Graves versus the State and it is found in 58 Ala. 359 and in 62 So. 2d 446. This is a copy taken directly from the decision as found in 62 So. 2d of Graves versus the State. I would like to put this in evidence in lieu of the Reporter itself.

Mr. Thornton: Well, the only reason I object to it is that we think it is completely needless. I am sure this Court will take judicial knowledge of the decisions of the Supreme Court of Alabama and it doesn't need to be introduced into evidence.

The Court: I don't believe you need to put it in evidence but you may submit it for the Court's benefit in a brief.

[22] Mr. Burton: Well, actually, I do want to say that I am offering it in evidence—

Mr. Thornton: Well, if you want to leave it with the Court, I will be delighted—

Mr. Burton: Well, I had one other case before where I made the same plea and one of the main objections was that I didn't put the decisions in evidence and I thought it was ridiculous but the Court seemed to be very much puzzled over it.

Mr. Thornton: The Supreme Court?

Mr. Burton: Yes, sir.

The Court: Well, give me the benefit of those Xerox copies.

Mr. Burton: This is Haden versus Olan Mills. That's another one. Here is another one, Olan Mills versus Opelika. That's in Federal Court. The reason for that

decision is that they said, well, the Federal Courts have no business in here because the State Courts have already defined what this license is and its characteristics and we don't have any right to more or less overturn the definition given by the State Courts. We do rely on these three cases.

The Court: Well, you offer them by way of argument?

Mr. Burton: That's right, and in support of our plea of Stare Decisis. This is not Res Judicata but we do say that it is Stare Decisis.

The Court: All right. The State has no further testimony?

Mr. Burton: No, Your Honor. That's all.

The Court: All right, I will take this case under advisement.

(Whereupon, *Graves v. State*, 62nd Southern Reporter, 2d; *Harry H. Haden, Commissioner of Revenue v. Olan Mills, Inc.*, 135 Southern Reporter, 2d; and *Olan Mills, Inc. of Tennessee, Plaintiff, v. Opelika, Greenville, Alexander City, Jasper and Thomasville, Alabama, Defendants*, 207 Federal Supplement; were marked as State Exhibit No. 3 for identification and were received in evidence and same is set out in words and figures hereinafter.)

(Exhibits omitted by agreement.)

[23]

DECREE.

This cause coming on to be heard upon the pleadings and proof, all as noted by the Register, and the Court being of opinion that the Court has jurisdiction proceeds to a finding of fact and a decree.

The Court recognizes a distinguishment in the facts of this case with the *Graves v. State*, 258 Ala. 539, 62 So. 2d 446 (1963), and the *Haden v. Olan Mills*, 273 Ala. 129, 135 So. 2d 388 (1961) cases. The distinguishment, however, is not such that this case is outside the operation of those decisions.

As was said in the *Family Discount v. State*, 274 Ala. 322, 148 So. 2d 218 (1963), the *Graves* and *Haden* cases (*supra*) involved facts which constituted local activity in Alabama which could be separated from the interstate process or flow of commerce. The tax was not allowed in the *Family Discount Case* (*supra*) as a question of fact, not a question of law.

This court is aware of the contrary result obtained in the jurisdictions of Missouri, Kentucky, Virginia, Florida and South Carolina.

The Supreme Court of Alabama, notwithstanding the above in the *Haden Case* (*supra*), remarked (Page 389, 155 So. 2d) that once before this Court, when presided over by this Court's predecessor, refused to follow the *Graves Case*. One such well meant admonishment is sufficient.

In both the *Haden* and *Graves Cases*, the Court above levied the tax upon the "conduct of its photographers".

The tax here imposed is upon the "conduct of its (Danbar-Stanley Studios, Inc.) Photographers."

It is, therefore, Ordered, Adjudged and Decreed by the Court as follows:

1. That the Appellant is liable for the tax imposed.
2. That the imposition of the tax in the instant case is not violative of any provisions of the Federal Constitution as viewed by the Supreme Court of Alabama.
3. That costs are hereby taxed against the Appellant, for which execution may issue.

Done this, the 14 day of March, 1967.

Richard P. Emmet,
Circuit Judge.

Filed in Office 14th day of March, 1967.

OPINION.

**The State of Alabama—Judicial Department.
The Supreme Court of Alabama.**

October Term, 1967-68:

3 Div. 278.

Dunbar-Stanley Studios, Inc.,

v.

State of Alabama.

**Appeal from Montgomery Circuit Court, in Equity
*Per Curiam.***

This is an appeal from a final decree of the circuit court of Montgomery County, in equity, that upheld a final assessment of license taxes made by the State Department of Revenue against the appellant imposed by the last line of Section 569, Title 51, Code of Alabama, 1940, reading:

“ * * * For each transient or traveling photographer,
five dollars per week.”

No procedural requisites are here questioned or involved.

Appellant, as we view the pleading and testimony, was a non-resident corporation with its principal place of business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina

studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney. Penney also did a certain amount of newspaper advertising relative to the photographic service.

When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no

office, developing laboratory, or permanent agent in Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to appellant for acceptance.

The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section.

Appellant and appellee have both submitted elaborate and comprehensive briefs in support of their respective contentions. We have carefully reviewed the arguments and the cases cited in an effort to resolve the law ap-

plicable to the pleadings and evidence. Such a resolution is not altogether free from difficulties.

While there were interstate orders submitted to appellant for the finished product, namely, the pictures, and certain preliminary advertising by Penney in recruiting business and customers, we cannot escape the impact and pertinency of two of our Alabama decisions rendered by this court on similar photographic transactions, although in some factual areas not on all fours with the instant transactions. We do not think these factual differences effect the basic pronouncements of this court in *Graves v. State*, 258 Ala. 359, 62 So. 2d 446 (1953), and in *Haden v. Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961). We observed in the *Graves* case, *supra*, as follows:

“ * * * It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. * * * The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the performance of a transaction, and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it.”

Paraphrasing *Lucas v. City of Charlotte*, 4 Cir., 86 F. 2d 394, 109 A. L. R. 297, the actual work of the photographer in the instant case and the mechanical finishing of the negatives in Charlotte, North Carolina, does not change the fact that the photographer is carrying on his business at the Penney stores in the State of Alabama.

Our observation in the **Haden v. Olan Mills, Inc.** case, *supra*, that the conduct of the photographer in the State is a separate and distinct incident upon which the license tax falls has merit and applies to the facts here.

We observed in **Family Discount Stamp Co. of Georgia v. State**, 274 Ala. 322, 325, 148 So. 2d 218, that in the **Graves** and **Haden** cases, *supra*, "there was local activity in Alabama which could be separated from the interstate process or flow of commerce. We do not think that condition exists in this case."

We are constrained to adhere to our pronouncements in the **Graves v. State**, *supra*, and **Haden v. Olan Mills, Inc.**, *supra*, cases until the Supreme Court of the United States has expressed itself on the factual situation before us.

We hold that the license tax required of transient or traveling photographers by Section 569, *supra*, should be collected from appellant, because of its so-called traveling operation in this State, until the Supreme Court of the United States holds to the contrary. The license tax is upon a local activity and does not infringe on or constitute a burden on interstate commerce.

The decree of the trial court is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

Livingston, C. J., and Lawson, Coleman and Harwood, JJ., concur.

JUDGMENT.

May 13, 1968.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term 1967-68.

3rd Div. 278.

Dunbar-Stanley Studios, Inc.

v.

State of Alabama.

Appeal from Montgomery Circuit Court,
In Equity.

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is Therefore Ordered, Adjudged and Decreed that the decree of the Circuit Court be in all things affirmed.

It Is Further Ordered, Adjudged and Decreed that the appellant, Dunbar-Stanley Studios, Incorporated, a Corporation, and The Travelers Indemnity Company, sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below, for which costs let execution issue.